Supreme Court, U.S
FILED

031389 APR 5 - 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JUDICIAL WATCH, INC.,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the names of individuals may be redacted from government records under the "similar files" provision of Exemption 6 of the Freedom of Information Act where the government records are not personnel, medical, or similar files about such individuals but, instead, are Internal Revenue Service records pertaining to an audit of Petitioner.

LIST OF PARTIES

The following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any:

Petitioner:

1. Judicial Watch, Inc.

Respondent:

1. Internal Revenue Service

Defendants:

1. Charles O. Rossotti
2. Donna Dorsey
3. Peter Breslan
4. Wayne Hampel
5. Steven T. Miller
6. United States of America

Judicial Watch, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of Judicial Watch, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Judicial Watch, Inc., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit ("Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-14) is not officially reported. The opinion of the Court of Appeals is unofficially reported at 94 Fed. Appx. 335, 2004 U.S. App. LEXIS 95, 2004-1 U.S. Tax Cas. (CCH) P50, 115, 93 A.F.T.R.2d (RIA) 344. The opinion of the U.S. District Court for the District of Maryland (App. 15-33) ("District Court") is not officially reported. The opinion of the District Court is unofficially reported at 2002 U.S. Dist. LEXIS 25213, 2003-1 U.S. Tax Cas. (CCH) P50, 201, 91 A.F.T.R.2d (RIA) 463.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 2004. This Petition for Writ of Certiorari is timely, as it is being filed within ninety (90) days of the Court of Appeals' ruling. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act ("FOIA") requires the disclosure of agency records unless one or more enumerated exemptions applies. *See generally* 5 U.S.C. § 552; S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965); *EPA v. Mink*, 410

U.S. 73, 79-80 (1973). The particular exemption at issue here, 5 U.S.C. § 552(b)(6) ("Exemption 6"), provides:

> This section does not apply to matters that are --
>
> * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . .

STATEMENT OF THE CASE

The opinion of the Court of Appeals represents a wholesale and improper judicial expansion of the "similar files" provision of FOIA's Exemption 6 and conflicts with this Court's precedent. If the Court of Appeals' ruling is allowed to stand, Exemption 6 will effectively be rewritten so that the mere name of an individual in any agency record, regardless of subject or type, will constitute a "similar file" under Exemption 6. In turn, this improper judicial expansion of Exemption 6 will require the courts routinely to scrutinize the government's redaction of individual names contained in government records not pertaining to those individuals but, instead, pertaining to third persons or entities. In so doing, the courts routinely will be burdened unnecessarily with the task of balancing the public interest in disclosure and the privacy rights of the named individual to determine whether his or her name may be disclosed in records that do not pertain to such individual.

In the instant case, the government records at issue are Internal Revenue Service ("IRS") audit records pertaining to

Petitioner, not personnel, medical or similar records pertaining to the individuals, likely IRS agents and officials, whose names incidentally appear in the audit records on Petitioner. Because this Court has ruled that Exemption 6 of FOIA covers only "detailed Government records on an individual which can be identified as applying to that individual," Exemption 6 does not cover the IRS audit records of Petitioner in the instant case or the names of individuals contained in those records. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). Because the Court of Appeals' ruling conflicts with this Court's prior rulings and because Exemption 6 is one of the most frequently invoked statutory exemptions in FOIA, this Court should issue a writ of certiorari to review the Court of Appeals' ruling.

Petitioner is a non-partisan, non-profit, tax-exempt, educational foundation organized in 1994 to restore ethics, morality and respect for law to our nation's public life. In furtherance of its public interest mission, Petitioner has pursued anti-corruption and abuses of power cases against politicians and government officials irrespective of their political party affiliation. Petitioner relies heavily on FOIA, the civil discovery process, and litigation in general, among other tools, to gather and disseminate information and to educate the American people about the operations of government. Petitioner, thus, not only has an interest in the particular records at issue, but also has a particular interest in the proper application of FOIA and its exemptions.

On October 14, 1998, Petitioner served the first of four FOIA requests on Respondent seeking access to all agency records referring or relating to Petitioner or its founder and former chairman. At that time, Respondent was attempting to

undertake an audit of Petitioner, and Petitioner suspected that Respondent initiated the audit to punish and retaliate against Petitioner for its public interest activities directed at certain Clinton Administration officials. Ultimately, Respondent commenced an audit of Petitioner.

Respondent answered Petitioner's FOIA requests, but withheld certain records, in whole or on part, based upon various claims of exemption. Included among the withheld material were the names of IRS employees who participated in the suspicious audit. Respondent redacted these names from the records it produced to Petitioner. Importantly, the records at issue are records pertaining to the audit of Petitioner, not detailed records on the individuals whose names were redacted by the IRS.

Respondent moved for summary judgment on its claims of exemption, and Petitioner cross-moved. On December 16, 2002, the District Court granted summary judgment in favor of Respondent and denied Petitioner's cross-motion. App. 15-33.

In so ruling, the District Court found that Respondent properly redacted the names of its employees from records about Petitioner under Exemption 6. App. 27-28. Although the District Court cited this Court's ruling in *Washington Post Co.* for the proposition that the "similar files" provision of Exemption 6 means *only* "detailed Government records on an individual which can be identified as applying to that individual," it did not appear to decide, and did not expressly state in its opinion, whether, as a factual matter, the records at issue are "similar files" under this Court's ruling *i.e.*, whether the records at issue are detailed government records

on the individuals whose names had been redacted that can be identified as applying to those individuals -- which they clearly are not. *Washington Post Co.*, 456 U.S. at 602. Rather, the District Court bypassed this critical inquiry and proceeded directly to the balancing portion of the Exemption 6 analysis. The District Court held:

> The Court concludes that federal employees do have a privacy interest in the non-disclosure of their names and that Plaintiff suffers no prejudice by the redaction of these names.

App. 28. Petitioner appealed.

On appeal, Petitioner asked the Court of Appeals to consider, *inter alia*, "[w]hether the District Court erred in holding that the IRS properly withheld documents under FOIA Exemption (b)(6)?" Petitioner properly pointed out in its brief to the Court of Appeals that, *before* there can be any balancing of interests under Exemption 6, the agency first must show the record at issue is a personnel, medical, or similar file about the individuals whose names were redacted. Petitioner argued that, because Respondent failed to demonstrate as an undisputed fact -- and cannot demonstrate -- that the records at issue pertaining to the audit of Petitioner are personnel files, medical files, or other detailed government records on the employees whose names had been redacted from Petitioner's audit files, the District Court erred in granting summary judgment to Respondent.

On January 6, 2004, the Court of Appeals affirmed. App. 1-14. Like the District Court, the Court of Appeals cited this Court's holding in *Washington Post Co.* App. 8. And like the

District Court, the Court of Appeals effectively ignored the test enunciated by this Court in *Washington Post Co.* that Exemption 6 covers *only* "detailed Government records on an individual which can be identified as applying to that individual." *Washington Post Co.*, 465 U.S. at 602. Effectively holding that *any* information about *any* individual found in *any* file, regardless of subject or type, constitutes a file "similar" to a personnel or medical file, the Court of Appeals, like the District Court, proceeded directly to the balancing portion of the Exemption 6 analysis. App. 8-10. The Court of Appeals struck the balance in favor of Respondent, finding that Petitioner had "offered no explanation as to how the names of lower-level I.R.S. employees would reveal information about the government's operations."[1] App. 10.

Judge Luttig dissented. App. 11-14. Noting that the majority glossed over the threshold issue of whether the mere name of an employee constituted a personnel, medical, or similar file within the meaning of Exemption 6, Judge Luttig took issue with the majority's holding:

> The majority never even addresses whether the I.R.S. employee names constitute personnel or similar files within the meaning of the (b)(6) exemption, that is, whether each employee name alone constitutes a detailed government record about that employee. It

---

[1] Of course, the Court of Appeals' finding presented a catch-22 for Petitioner because, without knowing the names redacted from the audit records on Petitioner, it is impossible for Petitioner to evaluate what effect those individuals may have had in instigating or pursuing the audit of Petitioner and what reasons those individuals may have had in taking the actions they took concerning the audit of Petitioner.

> simply maintains that each I.R.S. employee name is "information which 'applies to a particular individual'," *and for this reason* is a "personnel or similar file" within the meaning of section 552(b)(6). Of course, that a name is information relevant to a particular individual (which undoubtedly it is) says nothing at all about whether that name constitutes a detailed government record about that individual (which most assuredly it is not.)

App. 12-13 (citations omitted) (emphasis original).

Judge Luttig also recognized that only Petitioner, as the subject of the audit-related records, could reasonably argue that the records at issue were "detailed government records," albeit about Petitioner rather than the employees:

> Under this argument, however, only [Petitioner's] privacy would be relevant to determining whether disclosure of the I.R.S. employee names "would constitute a clearly unwarranted invasion of personal privacy." And thus the I.R.S. employees' privacy interests in the nondisclosure of their names would be irrelevant and could not serve to justify the withholding at issue here.

App. 13.

Judge Luttig concluded by observing that the majority's opinion constituted an improper judicial expansion of Exemption 6:

> The courts have long construed the Freedom of Information Act's exemptions so as to effectuate their own view of the proper balance between information that must be produced and information that may permissibly be withheld, typically reading the disclosure provisions of the Act narrowly and its exemptions from disclosure broadly. If the Freedom of Information Act's provisions governing production and exemption are to be contracted and expanded, those contractions and expansions should be effected not by the judiciary under the guise of interpretation, but by the Congress through legislative amendment.

App. 14. This improper judicial expansion of an often-invoked and important statutory exemption conflicts with this Court's ruling and goes to the very heart of why a writ of certiorari should issue herein.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Implicit Holding That IRS Employees' Names Contained In Audit Records On Petitioner Are Detailed Records On Such Employees Similar To Personnel Or Medical Files Is Contrary To The Legislative Intent Underlying Exemption 6 And Conflicts With This Court's Precedent.

FOIA has become an integral part of our democracy, and the public's zeal for open government cannot be doubted. Indeed, since its passage into law in 1966, FOIA has become a powerful tool in the hands of the people. In enacting FOIA, Congress obviously recognized that an essential aspect of a

democracy is an informed citizenry. As the old adage goes -- sunlight truly is the best disinfectant.

The Government Accounting Office recently weighed in on the importance of FOIA in America by examining recent trends in FOIA requests and agencies' reliance upon various exceptions. U.S. General Accounting Office, *Information Management: Update on Freedom of Information Act Implementation Status,* GAO-04-257 (Washington, D.C. February 18, 2004) (hereinafter "Report"). Twenty-five agencies were surveyed for the Report. *Id.* at 13. These agencies acknowledged receipt of over 2.3 million FOIA requests for the year 2002. *Id.* This is a staggering number and shows the public's strong desire to obtain information about the operations of our government.

Even more dramatic, however, is the reported use of exemptions to prevent FOIA requesters from obtaining government records. The reported use of exemptions increased by approximately 33 percent from 2000 to 2001 and by approximately 73 percent from 2001 to 2002. *Id.* at 48. According to the Report, in 2002, agencies cited FOIA exemptions approximately 504,000 times in seeking to withhold responsive government records from FOIA requesters. *Id.* Of particular relevance to this case is the fact that nearly 200,000 of these 504,000 exemptions were asserted under Exemption 6. *Id.* at 48-49. An equal number were asserted under Exemption 7(c), and the remaining 100,000 or so were asserted under the other exemptions. *Id.* Also of particular relevance to this case is the fact that the use of Exemption 6 increased by about 95 percent from 2001 to 2002. *Id.*

As this Court has so aptly recognized, FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). The purpose of FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Id.* at 361. It enables citizens to "know what their government is up to." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). While FOIA contains nine statutory exemptions, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* They "must be narrowly construed." *Id.* at 361; *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

While this Court has found that the "similar files" provision of Exemption 6 was intended to have a broad, rather than a narrow, meaning (*Washington Post Co.*, 456 U.S. at 600), it has never held that the exemption must be construed so broadly as to incorporate any file, regardless of subject or type. Rather, this Court has defined "similar files" as "detailed Government records on an individual which can be identified as applying to that individual." *Id.* at 602.

As Judge Luttig observed in his dissent below, an individual's name is not a "file," nor is it a detailed government record about that individual. App. 12-13. Nor are Petitioner's audit files "personnel and medical files and similar files" about IRS employees. 5 U.S.C. § 552(b)(6).

Under the clear precedent of this Court, a court must determine whether disclosure of requested information will

constitute a clearly unwarranted invasion of personal privacy only if it first finds that the requested information constitutes a "detailed government record[]on an individual which can be identified as applying to that individual." *Washington Post Co.*, 456 U.S. at 602. Thus, the balancing test need not be addressed unless the court finds -- as it failed to find in the instant case -- that the redacted information is a "similar file." Furthermore, the balancing test is not only secondary to this threshold determination, but, indeed, the scales of the balance should be calibrated in conformance with the extent to which the "file" may be deemed personal to the individual -- a measurement that can only be quantified during the initial inquiry. Whether a file is "similar" to a personnel or medical file requires an analysis of the contents of the file in order to determine whether the privacy expectation is similar to privacy expectations in such personal matters.

Courts may not simply assume that any information about an individual in a particular file, without regard to subject or type, gives rise to the same privacy expectations that attach to information in a personnel or medical file. To make such an improper assumption not only ignores the plain language of FOIA, but also ignores both this Court's admonition that the statute's exemptions are to be construed narrowly and this Court's prior ruling defining "similar files." *Rose*, 425 U.S. at 361; *Washington Post Co.*, 456 U.S. at 602.

Both the District Court and the Court of Appeals disregarded this Court's holding in *Washington Post Co.* that the "similar files" provision of Exemption 6 covers *only* "detailed Government records on an individual which can be identified as applying to that individual." *Washington Post Co.*, 456 U.S. at 602. In the District Court, Respondent

argued that no public interest exists in disclosing the employees' names because disclosure would not satisfy the "core purpose" of FOIA. App. 27. Notably, this argument is only relevant to the second inquiry under Exemption 6, which balances the public and private interests. *Washington Post Co.*, 456 U.S. at 602. Furthermore, it ignores the fact that Respondent bore the burden of showing how the redacted names were "similar" to "medical" or "personnel" files in order to satisfy Exemption 6. 5 U.S.C. § 552(a)(4)(B).

Nevertheless, without hesitation, the District Court summarily concluded that "federal employees do have a privacy interest in the non-disclosure of their names and that [Petitioner] suffers no prejudice by the redaction of these names." App. 28. However, to say that federal employees have a privacy interest in their names says nothing at all about whether the existence of those names (within agency records concerning a third party) constitutes a "file" *similar* to a personnel or medical file *on those* employees, which is what Exemption 6 requires. To hold otherwise ignores the plain language of the statute and conflicts with the relevant decisions of this Court.

The Court of Appeals fared no better. It affirmed the District Court's ruling "for the reasons stated in [its] opinion," then proceeded to "clarify" two issues -- the first of which related to Exemption 6. App. 7. Citing *Washington Post Co.*, the Court of Appeals opined that:

> [U]nder Supreme Court precedent Exemption 6 extends to "all information which 'applies to a particular individual' . . . *regardless of the type of file in which it is contained.*"

App. 8 (emphasis original) (citations omitted). However, this Court has never so held. In *Washington Post Co.*, this Court did not hold that Exemption 6 applies "regardless" of the type of file involved. Instead, it ruled that Exemption 6 was "intended to cover *detailed* Government records *on* an individual which can be identified as applying to *that* individual." *Id.* (emphasis added). Had this Court meant to say that Exemption 6 applied "regardless of the type of file," it clearly would have done so.

As such, the Court of Appeals' ruling clearly conflicts with this Court's prior rulings in an important way. In order to square the Court of Appeals' ho'ding with this Court's precedent, one must conclude, as the lower courts did, that an individual's name, regardless of the subject or type of file in which the name appears, constitutes a detailed Government record *on that* individual. Of course, as Judge Luttig noted in the dissent, "[t]he lone name of an IRS employee that appears in an agency document relating to a tax audit of a private citizen is simply not a detailed government record on that IRS employee." App. 12. The fact that the audit files concerning Petitioner are not detailed records on the IRS employees whose names were redacted from those records makes the IRS employees' privacy interests in the nondisclosure of their names utterly irrelevant and cannot serve as any justification for withholding their names.

It appears that both lower courts considered only half of the threshold inquiry under *Washington Post Co.* They considered only whether the records at issue could be "identified" as applying to a particular individual. However, they ignored the true thrust of the inquiry, which is whether the records at issue are "detailed government records" about

the individual so identified. *Washington Post Co.*, 456 U.S. at 602. Such casual application of exemption standards also flies in the face of FOIA's presumption of disclosure and this Court's rulings that FOIA's exemptions are to be construed narrowly. *Rose*, 425 at 361; *see also Tax Analysts*, 492 U.S. at 151.

It is important to note that in *Rose*, *Washington Post Co.*, and *Reporters Committee for Freedom of the Press*, the Court upheld the withholding of personal information, but, in each case, the redaction applied only to personal information relating to the actual *subject* of the file. *Rose*, 425 U.S. at 354-55 (case summaries of disciplinary proceedings of cadets accused of honor code violations in the Air Force Academy); *Washington Post Co.*, 456 U.S. at 596 (passport files of Iranian nationals living in Iran); *Reporters Committee for Freedom of the Press*, 489 U.S. at 751 (FBI criminal information known as "rap sheets").

More recent cases exhibit the same quality. *U.S. Dep't of State v. Ray,* 502 U.S. 164, 166 (1991) (names of Haitian nationals interviewed by the State Department); *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 489 (1994) (home addresses of federal employees). None of these cases turn on facts similar to the facts of the instant case.

That these cases concern the disclosure of information related to the *subjects* of the "files" supports the notion that, in order for a file to be "similar" to a personnel or medical file, it must -- at the very least -- be a file *on* the individual whose privacy concerns are at issue. This is completely consistent with, if not required by, the Court's prior ruling that Exemption 6 only applies to "detailed government records *on*

an individual which can be identified as applying to *that* individual." *Washington Post Co.*, 456 U.S. at 602 (emphasis added).

To hold otherwise is to reduce Exemption 6 to nothing more than a balancing test. An agency could redact the name of any individual, including the names of its own officials, from every document produced under FOIA and, thereby, force a requestor to make a particularized showing of need before any name could ever be released. This would be the case even where, as here, the record at issue is a record about the requester.

Petitioner submits that knowing the names of individuals referenced in government records, especially the names of government officials, is vital to knowing "what the[] government is up to." *Reporters Committee for Freedom of the Press*, 489 U.S. at 773. Petitioner also submits that, without knowing the name of government official(s), a FOIA requester may not be able to demonstrate the importance of "what the[] government is up to" in order to prevail on a balancing test. To turn Exemption 6 into nothing more than a balancing test places an undue burden on FOIA requesters and also authorizes a wholesale and improper judicial expansion of the exemption, which undoubtedly will lead to the withholding of important information about the operations of government. Congress never intended Exemption 6 to be so broad. If it had, it could simply have said so.

Clearly, the importance of this case reaches far beyond the instant facts. The ramifications of the Court of Appeals' ruling, if left to stand, will have an adverse impact upon millions of American citizens who, in future years, rely upon

FOIA as their window into government activity. The Court should issue a writ of certiorari to review the Court of Appeals' ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A - JANUARY 6, 2004
APPELLATE COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 03-1160
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
	)	
Defendants-Appellees.	)	
	)	

On Appeal from the United States District Court for the District of Maryland at Baltimore. William M. Nickerson, Senior District Judge. (CA No. WNM-01-2672).

84 Fed. Appx. 335; 2004 U.S. App. LEXIS 95;
2004-1 U.S. Tax Cas. (CCH) P50,115;
93 A.F.T.R.2d (RIA) 344.

September 26, 2003, Argued
January 6, 2004, Decided

DISPOSITION:

Affirmed.

COUNSEL:

ARGUED: Dale L. Wilcox, JUDICIAL WATCH, INC., Washington, D.C., for Appellant.

Gretchen M. Wolfinger, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Larry Klayman, Paul J. Orfanedes, JUDICIAL WATCH, INC., Washington, D.C., for Appellant.

Eileen J. O'Connor, Assistant Attorney General, Thomas M. DiBiagio, United States Attorney, Jonathan S. Cohen, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

JUDGES: Before NIEMEYER, LUTTIG, and MOTZ, Circuit Judges. Judge Motz wrote the majority opinion, in which Judge Niemeyer joined. Judge Luttig wrote an opinion dissenting in part.

OPINION BY: DIANA GRIBBON MOTZ

OPINION: DIANA GRIBBON MOTZ, Circuit Judge:

Judicial Watch, Inc. submitted a series of requests under the Freedom of Information Act (FOIA) to the Internal Revenue Service (I.R.S.). In response, the I.R.S. released 785

of 807 pages in full and redacted portions of 125 more pages. The I.R.S. claimed the protection of various FOIA exemptions for the withheld material. Judicial Watch then initiated this action, asserting *inter alia*, that the I.R.S. had unlawfully withheld information from responsive documents, and seeking to compel release of this information. The district court granted summary judgment to the I.R.S. We affirm.

I.

Judicial Watch, a non-profit public interest law firm, describes its purpose as "uncovering government corruption and then educating the public about its findings." Judicial Watch submitted four requests under FOIA to eleven offices of the I.R.S., including the Baltimore Office, in letters dated October 14, 1998; April 14, 2000; January 13, 2001; and July 27, 2001. The requests sought all records referring or relating to Judicial Watch and/or its founder, Larry Klayman.

The I.R.S. responded to the 1998 request in 1999 by releasing in full to Judicial Watch 317 of 382 pages of responsive documents. It responded to the January 13, 2001 request later that year by releasing in full to Judicial Watch 70 of 73 pages of responsive documents. Finally, on June 11, 2002, the I.R.S. released in full to Judicial Watch an additional 498 pages of documents responsive to the 2000 and July 27, 2001 requests.

In all, the I.R.S. continues to withhold twenty-two pages of responsive documents in full and portions of 125 pages. Those documents consist of: (1) redacted "return information" of taxpayers other than Judicial Watch in the

form of memoranda, document transmittals, FAX cover sheets, and reports; (2) identifying information concerning lower-level I.R.S. employees; (3) the redacted names, addresses, and postal bar codes of private individuals who wrote to the I.R.S., either directly or through their elected representatives, expressing concerns about Judicial Watch; (4) a recommended list of issues to be pursued in the still-ongoing audit of Judicial Watch and a discussion of the I.R.S.'s ability to support its position on those issues on one page of a revenue agent's case history sheet; (5) internal e-mails among attorneys in the I.R.S. Office of Chief Counsel containing information provided to I.R.S. attorneys regarding the audit of Judicial Watch, the opinions of those I.R.S. attorneys, and drafts of those attorneys' advice; and (6) draft legal opinions and advice from the Assistant District Counsel for the Delaware-Maryland District to the Delaware-Maryland District Director of the I.R.S.

II.

The parties filed cross motions for summary judgment. Judicial Watch argued that the I.R.S. had unlawfully withheld responsive documents and inappropriately redacted certain information from the partially released documents. Specifically, it contended that the I.R.S. had failed to perform an adequate search, had failed to submit an adequate index of withheld documents, and had improperly withheld documents under various FOIA exemptions, including FOIA Exemptions 5, 6, and 7(C). 5 U.S.C. § 552(b)(5), (6), 7(C) (2000).

The district court denied Judicial Watch's motion for summary judgment and granted the I.R.S. summary judgment. *Judicial Watch, Inc. v. Rossotti*, 2002 U.S. Dist. LEXIS

25213, No. WMN-01-2672, 2002 WL 31962775 (D. Md. Dec. 16, 2002). Based on the affidavit of an I.R.S. disclosure employee, the court concluded that the I.R.S. had "met its burden of showing that it conducted an adequate search." The court further concluded that the declaration of an I.R.S. attorney constituted an index that "describes the withheld material in sufficient detail to enable the Court to determine whether the pages fall within the claimed exemption."

As for the I.R.S.'s invocation of the various FOIA exemptions, the court found that the I.R.S. properly redacted lower-level clerical employees' names from five pages of responsive documents pursuant to 5 U.S.C. § 552(b)(6). The court reasoned that "federal employees do have a privacy interest in the non-disclosure of their names" and Judicial Watch would "suffer[]no prejudice by the redaction of these names." The court explained that although Judicial Watch had "argued that disclosure of these employees' names is necessary to vindicate its rights," it had not explained "how knowledge of the names will help in that vindication."

Similarly, the court found that the I.R.S. properly invoked 5 U.S.C. § 552(b)(7)(C) to redact from eighty-eight pages the names and addresses of people who wrote to the I.R.S. expressing concerns about Judicial Watch because these individuals had a recognized privacy interest in their names and addresses and the disclosure of this information would contribute nothing to the public understanding of the operations or activities of the I.R.S. Finally, the court found that the I.R.S. had properly withheld two draft legal opinions and redacted information from another fifteen pages under 5 U.S.C. § 552(b)(5) because "these types of documents are the

type traditionally protected by the government deliberative process privilege."

III.

After carefully considering the record, the briefs, and the applicable law, and having the benefit of oral argument from the parties, we conclude that the district court properly granted the I.R.S. summary judgment. Accordingly, we affirm for the reasons stated in the district court's opinion and engage in further discussion only to provide clarity on two issues.

A.

Before the district court, Judicial Watch argued that the I.R.S. failed to perform an adequate search because it "failed to produce or even reference . . . numerous documents known to Judicial Watch, which are without question in the possession of Defendants," including documents relating to Judicial Watch's criminal conflict of interest complaints against the I.R.S. Commissioner, its written request to meet with the Commissioner, and the two meetings that Judicial Watch had with the I.R.S. in 1999. Judicial Watch argued that the fact that these documents were contained in the I.R.S.'s document submission to the United States District Court for the District of Columbia in the pending I.R.S. summons enforcement action against Judicial Watch evidenced the I.R.S.'s bad faith conduct in its search for responsive documents.

On appeal, however, Judicial Watch challenges the adequacy of the I.R.S.'s search on entirely different grounds.

Namely, Judicial Watch argues that the I.R.S. did not search for documents relating to Judicial Watch founder and chairman, Larry Klayman, as Judicial Watch had requested; did not formally declare in its affidavit that "the search performed included all files that would likely contain responsive documents"; and improperly limited its search to the I.R.S.'s Baltimore District Office and Tax Exempt and Government Entities (TEGE) function.

Though Judicial Watch contends these new arguments are simply a "further articulation" of its district court arguments, in fact these arguments would require us to address issues of law and fact not considered in the court below. We will not address issues, unless raised in the district court, absent exceptional circumstances. *See Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993); *United States v. One 1971 Mercedes Benz*, 542 F.2d 912, 915 (4th Cir. 1976). No such exceptional circumstances exist in the present case, and hence we affirm the district court's finding "that the I.R.S. has met its burden of showing that it conducted an adequate search" without addressing Judicial Watch's new arguments.

B.

Our final point involves the district court's rejection of Judicial Watch's challenge to the IRS redaction of the names of "lower-level employees . . . contained in correspondence or a correspondence control log" under Exemption 6.

This exemption protects information contained in an agency's "personnel and medical files and *similar files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6)

(emphasis added). The Supreme Court has directed that the phrase "similar files" has a "broad, rather than a narrow, meaning," and expressly rejected the contention that such files must contain "highly personal" or "intimate" information to fall within the exemption. *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 598, 600, 72 L. Ed. 2d 358, 102 S. Ct. 1957 (1982). Rather, under Supreme Court precedent Exemption 6 extends to "all information which 'applies to a particular individual' . . . *regardless of the type of file in which it is contained.*" *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 223 U.S. App. D.C. 139, 690 F.2d 252, 260 (D.C. Cir. 1982) (emphasis added) (citing *Washington Post*, 456 U.S. at 602). Thus, this exemption clearly applies to the employee names in the correspondence at issue here if the disclosure of such names "would amount to a clearly unwarranted invasion of the privacy of *any* person." *Washington Post*, 456 U.S. at 602 n. 3 (emphasis added) (internal quotations and citation omitted).

In *United States DOD v. Fed. Labor Relations Auth. (FLRA)*, 510 U.S. 487, 489, 127 L. Ed. 2d 325, 114 S. Ct. 1006 (1994), the Supreme Court expressly held that the disclosure of employee *addresses* would constitute such a "clearly unwarranted" invasion of privacy. In doing so, the Court explained that whether an invasion of privacy was "clearly unwarranted" should be determined by balancing the asserted privacy interests against the "only relevant public interest . . . the extent to which disclosure of the information would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* at 497 (internal quotations and citation omitted). Applying this standard, the Court found that the privacy interests of federal employees in their home addresses was

"nontrivial" and "not insubstantial," *id.* at 500, 501, that the public interest in disclosure was "virtually non-existent," *id.* at 500, and therefore the disclosure of the addresses "would constitute a 'clearly unwarranted invasion' of the employees' personal privacy within the meaning" of Exemption 6. *Id.* at 489.

Accordingly, in conducting the Exemption 6 analysis here we must weigh the privacy interest of lower level federal employees in the nondisclosure of their names "against . . . the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* at 497 (internal quotations and citation omitted). Although the privacy interest of employees in the nondisclosure of their *names* was not at issue in *Dep't of Def.*, the Court's determination that the privacy interest protected by Exemption 6 encompasses the right of employees not to be "disturbed at home by work-related matters" and to "control . . . information concerning his or her person," and that these interests do "not dissolve simply because that information may be available to the public in some form," *id.* at 500-01, persuades us that the Court's rationale applies to names as well as addresses. See also *Sheet Metal Workers Int'l Ass'n, Local No. 9 v. United States Air Force*, 63 F.3d 994 (10th Cir. 1995). This is so particularly given that, in ruling on the addresses, the *Dep't of Def.* Court resolved a conflict among the circuits, 510 U.S. at 492, siding with the majority of courts which had found that the privacy interest protected by Exemption 6 encompassed not only the addresses, but also the *names* of federal employees. *See, e.g., United States Dep't of Navy v. FLRA*, 975 F.2d 348, 353 (7th Cir. 1992) (citing other cases for this proposition).

With respect to the public interest in disclosure, Judicial Watch has offered no explanation as to how the names of lower-level I.R.S. employees would reveal information about the government's operations. Moreover, we have previously recognized that the public interest in the names of government employees alone "would appear to be negligible" absent a "compelling allegation of agency corruption or illegality," *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000), which, in an earlier chapter in this case, we determined did not exist. *See Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 406 (4th Cir. 2003) (noting that Judicial Watch's allegation regarding an illegal retaliatory audit "finds little support in the record"). Thus in this case, as in *Dept. of Def.*, there is a "virtually nonexistent FOIA-related public interest in disclosure," which would be outweighed by even a "very slight privacy interest," let alone the "not insubstantial" privacy interest at issue here. *Id.* at 500. Accordingly, the district court did not err in holding that the federal employees' privacy interest in their names outweighed the public interest in the disclosure.

We reached this conclusion in the context of an Exemption 7(C) case. However, the Supreme Court, although recognizing that the *magnitude* of the public interest necessary to outweigh the privacy interest in an Exemption 6 case is less than that necessary in an Exemption 7(C) case, has found the relevant public interest to be weighed when determining whether disclosure is required is the same with respect to both Exemption 6 and Exemption 7(C). *See Dep't of Def.*, 510 U.S. at 496 n.6.

AFFIRMED.

DISSENT BY: LUTTIG (In Part)

DISSENT: LUTTIG, Circuit Judge, dissenting in part:

I concur in the majority's opinion except to the extent that it affirms the district court's judgment that the Internal Revenue Service lawfully withheld from production under 5 U.S.C. § 552(b)(6) the names of lower-level I.R.S. employees that appeared on documents that were responsive to Judicial Watch's Freedom of Information Act request.

Section 552(b)(6) exempts agencies from any obligation to produce under FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While never specifying how the deleted I.R.S. employee names qualify as personnel files, medical files, or similar files, the district court upheld the I.R.S.' redactions, stating merely that "federal employees do have a privacy interest in the nondisclosure of their names and that Plaintiff suffers no prejudice by the redaction of these names." J.A. 50-51.

I would reverse the district court and require the I.R.S. to disclose the redacted names. The lone name of an I.R.S. employee appearing on a document related to a tax audit performed by the Service is not even arguably a "personnel . . . medical . . . [or] similar file[][,]" under even the most expansive definitions of those terms imaginable. As the Supreme Court held in *Department of the Air Force v. Rose*, 425 U.S. 352, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976), a personnel file is a file containing "vast amounts of personal data" which constitute a "profile of an individual . . . showing, for example, where [a person] was born, the names of his

parents, where he has lived from time to time, his high school or other school records, results of examination, evaluations of his work performance." *Id.* at 377. It is obvious that the redacted I.R.S. employee names are not "personnel files" as so defined in *Rose*, and, to its credit, the government does not even attempt to argue otherwise. *See* Appellee's Br. at 61-63.

But it is just as clear (with respect to the claim that the government does make) that these names are not "similar files" to personnel and medical files, within the meaning of the section 552(b)(6) exemption. The Supreme Court in *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 72 L. Ed. 2d 358, 102 S. Ct. 1957 (1982), held that files "similar" to personnel and medical files are files that contain, as do the type of personnel file described in *Rose*, "detailed Government records on an individual which can be identified as applying to that individual." *Id.* at 602. The lone name of an I.R.S. employee that appears in an agency document relating to a tax audit of a private citizen is simply not a detailed government record on that I.R.S. employee. *Compare, e.g., Rose*, 425 U.S. at 355, 376-77 (holding that detailed case summaries of cadet disciplinary proceedings were files similar to personnel files); *Washington Post*, 456 U.S. at 600-01 (holding that files containing the details of a passport application were similar files); *United States Dep't of State v. Ray*, 502 U.S. 164, 173, 116 L. Ed. 2d 526, 112 S. Ct. 541 (1991) (holding that detailed post-repatriation interviews with unsuccessful Haitian asylum seekers were similar files).

The majority never even addresses whether the I.R.S. employee names constitute personnel or similar files within the meaning of the (b)(6) exemption, that is, whether each

employee name alone constitutes a detailed government record about that employee. It simply maintains that each I.R.S. employee name is "information which 'applies to a particular individual'," see *Washington* 456 U.S. at 600 (citing *Washington Post Co. v. United States Department of Health & Human Services*, 223 U.S. App. D.C. 139, 690 F.2d 252, 260 (D.C. Cir. 1982) (quoting *Washington Post*, 456 U.S. at 598, 600), *and for this reason* is a "personnel or similar file" within the meaning of section 552(b)(6). Of course, that a name is information relevant to a particular individual (which undoubtedly it is) says nothing at all about whether that name constitutes a detailed government record about that individual (which most assuredly it is not).

Finally, although it is not even plausible to maintain that the names of the I.R.S. employees at issue are personnel or similar files of these employees, it would be open to argument, based upon existing Supreme Court precedent, that the audit-related documents from which these employee names were redacted do constitute detailed government records, and therefore "similar files" under (b)(6), of Judicial Watch. Under this argument, however, only Judicial Watch's privacy would be relevant to determining whether disclosure of the I.R.S. employee names "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). And thus the I.R.S. employees' privacy interests in the nondisclosure of their names would be irrelevant and could not serve to justify the withholding at issue here.

Because I do not believe that the mere names of I.R.S. employees at issue in this litigation may be withheld as "personnel and medical files and similar files" under section 552(b)(6), I dissent from the court's affirmance of the district

court's judgment that the exemption from disclosure in section 552(b)(6) is properly invoked to withhold these names.

The courts have long construed the Freedom of Information Act's exemptions so as to effectuate their own view of the proper balance between information that must be produced and information that may permissibly be withheld, typically reading the disclosure provisions of the Act narrowly and its exemptions from disclosure broadly. If the Freedom of Information Act's provisions governing production and exemption are to be contracted and expanded, those contractions and expansions should be effected not by the judiciary under the guise of interpretation, but by the Congress through legislative amendment.

APPENDIX B - DECEMBER 16, 2003 DISTRICT COURT MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	WMN-01-2672
CHARLES O. ROSSOTTI,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

2002 U.S. Dist. LEXIS 25213; 2003-1 U.S. Tax Cas. (CCH) P50, 201; 91 A.F.T.R.2d (RIA) 463

December 16, 2002, Decided
December 16, 2002, Filed

COUNSEL:

For JUDICIAL WATCH, INC., plaintiff: David Barmak, Joanne B Jarquin, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Reston, VA USA.

For DEPARTMENT OF THE TREASURY, THE INTERNAL REVENUE SERVICE, defendants: Stuart D Gibson, United States Department of Justice, Washington, DC USA.

JUDGES: William M. Nickerson, Senior United States District Judge.

OPINION BY: William M. Nickerson

OPINION:

MEMORANDUM

Before the Court are Plaintiff's Motion for Summary Judgment (Paper No. 44) and Defendant's Motion for Summary Judgment (Paper No. 56). The motions have been fully briefed and are ripe for decision. Upon review of the pleadings and applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6), and that Plaintiff's motion will be denied and Defendant's motion granted.

I. BACKGROUND

Plaintiff filed this lawsuit in September 2001, seeking relief from the Commissioner of Internal Revenue and four lower-lever Internal Revenue Service (I.R.S.) employees. Additionally, Plaintiff sought to compel Defendant I.R.S. to produce documents responsive to four separate requests made under the Freedom of Information Act (FOIA) between October 1998 and July 2001. On January 11, 2002, Plaintiff filed an Amended Complaint in which, inter alia, it added a

fifth claim to enforce a FOIA request made on December 18, 2001. This Court has previously dismissed all claims against the individual Defendants.[1] The only claims that remain before this Court involve Plaintiff's attempts to compel Defendant I.R.S. to produce additional documents sought in its five FOIA requests. *See* Counts IV and V of Amended Complaint. Both parties have filed motions for summary judgment as to these counts.[2]

Plaintiff made FOIA requests to eleven I.R.S. offices, including the Baltimore Office, in letters dated October 14, 1998; April 14, 2000; January 13, 2001; July 27, 2001; and December 18, 2001.[3] In essence, Plaintiff requested that the I.R.S. produce all documents from 1994 to the date of each request, "that refer or relate to [Larry Klayman, Judicial Watch's founder and chairman, or Judicial Watch, Inc.] in any way." Pl.'s Exhs. 1, 6, 10, and 13.

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[1] *See* Memorandum and Order, March 27, 2002 (Paper Nos. 27 and 28).

[2] The I.R.S. relies on the declarations of Sarah Tate, an attorney in the office of the I.R.S. Assistance Chief Counsel, Disclosure and Privacy Law, Melody Magin, a Disclosure Specialist in the Baltimore office of the I.R.S., and Michael Frosch, a Branch Chief in the office of the I.R.S. Assistance Chief Counsel, Disclosure and Privacy Law.

[3] Plaintiff has filed a lawsuit in the United States District Court for the District of Columbia to enforce the FOIA requests made to I.R.S. offices outside Maryland. *Judicial Watch, Inc. v. IRS*, C.A. No. 1:02cv928 (RJL). Dispositive motions have been filed in that action. Defs.' Mot. at 4. In the interest of judicial efficiency, this Court will limit its review to Plaintiff's FOIA requests directed to the I.R.S. office in Maryland. The Baltimore Disclosure Office was responsible for processing these FOIA requests. *Id.* at 5.

Over the course of four years, the I.R.S. responded to Plaintiff's various FOIA requests. In 1999 and 2001 (before Plaintiff filed this lawsuit), the I.R.S. released in full 387 pages of documents responsive to Plaintiff's October 14, 1998 and January 13, 2001 FOIA requests. Magin Decl. at PP 4, 6. On June 11, 2002 (after Plaintiff filed this lawsuit, but before it filed its motion for summary judgment), the I.R.S., through its attorneys in this lawsuit, released in full an additional 498 pages of documents responsive to the October 14, 1998; April 14, 2000; January 13, 2001; and July 27, 2001 FOIA requests.[4] Tate Decl. at P 6. The I.R.S. continues to withhold in full 22 pages of responsive documents and portions of another 125 pages of responsive documents.[5] *Id.* at P 7. Those documents consist of: (1) redacted "return information" of taxpayers other than Plaintiff in the form of memoranda, document transmittals, FAX cover sheets, and reports; (2) identifying information concerning lower-level I.R.S. employees; (3) identifying information concerning

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[4] The Tate Declaration contends that the Baltimore Disclosure Office identified 694 pages as potentially responsive to Plaintiff's first four requests. Tate Decl. at P 6. Of these potentially responsive pages, 498 pages have been released in full to Plaintiff. *Id.* Of the remaining 196 pages, the Tate declaration revealed that one partial page and 48 full pages are not responsive because either they were created after the Baltimore Disclosure Office received Plaintiff's fourth FOIA request or they pertain exclusively to a taxpayer other than Plaintiff. *Id.*

[5] While this Court cannot independently determine this number through the factual history given, a court is entitled to accept the credibility of any affidavits, so long as there is no reason to question the good faith of the agency. *Bowers v. Dep't of Justice*, 930 F.2d 350, 357 (4th Cir.), *cert. denied*, 502 U.S. 911, 116 L. Ed. 2d 250, 112 S. Ct. 308 (1991). The Tate Declaration reveals that five of these pages have material redacted pursuant to two different FOIA exemptions. Tate Decl. at P 7 n.6.

private individuals who wrote to the I.R.S., either directly or through their elected representatives, expressing concern about Judicial Watch; (4) the Revenue Agent's Case Chronology Log, which consists of a recommended list of issues to be pursued in the still-ongoing audit of Plaintiff; (5) internal e-mails among attorneys in the I.R.S. Office of Chief Counsel; and (6) draft legal opinions and advice from the Assistant District Counsel for the Delaware-Maryland District to the Delaware-Maryland District Director of the I.R.S. *Id.* at PP 8-12. Plaintiff argues that the I.R.S. has unlawfully withheld responsive documents and inappropriately redacted certain information from the partially released documents. The I.R.S. asserts that it is entitled to judgment as a matter of law because various FOIA exemptions apply to the documents at issue.

II. STANDARD OF REVIEW

The Freedom of Information Act was enacted to maintain an open government and to ensure the existence of an informed citizenry "to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978). The FOIA is to be construed broadly to provide information to the public in accordance with its purposes, and the exemptions from production are to be construed narrowly. *Ethyl Corp. v. United States E.P.A.*, 25 F.3d 1241, 1245 (4th Cir. 1994) (citing *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8, 100 L. Ed. 2d 1, 108 S. Ct. 1606 (1988)). Upon complaint, a district court must make a de novo determination of whether government records

were properly withheld under a FOIA exemption provision.[6] 5 U.S.C. § 552(a)(4)(B). The agency refusing to release the information bears the burden of proving that its actions were correct.[7] *Id.*

If a district court has jurisdiction, it has authority to enjoin the withholding of the documents and to order the production of any agency records that are improperly withheld. *Id.* A federal court only has jurisdiction to devise a remedy upon a showing that the agency has: (1) improperly; (2) withheld; (3) agency records. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980). An agency acts improperly "'when a record is withheld outside one of the enumerated FOIA exceptions.'" *Kim v. Internal Revenue Service*, 1999 U.S. Dist. LEXIS 20612, 1999 WL 1424998, at *2 (D. Md. 1999) (quoting *Bartlett v. United States Dep't of Justice, Fed. Bureau of Investigation*, 867 F. Supp. 314, 315 (E.D. Pa. 1994). An agency withholds records only when it has custody over the documents and does not release them. *Id.* Finally, an agency record "is defined as material created or obtained by the agency, that is in the agency's control at the time the FOIA request is made." *Bartlett*, 867 F. Supp. at 315. An agency has no duty to create records upon a FOIA request. *Id.*

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[6] The exemptions are codified in 5 U.S.C. § 552(b).

[7] The agency may sustain its burden by submitting affidavits which provide a reasonably detailed analysis of the requested documents and the reasons for provoking a particular exemption. The Court may grant summary judgment solely on the basis of these agency affidavits if they are clear, specific, and reasonably detailed, and describe the withheld information in a factual and non-conclusory manner. *Miller v. Dep't of State*, 779 F.2d 1378, 1383 (8th Cir. 1985).

In order to file suit under the FOIA, a requester must first exhaust all its administrative remedies. *Pollack v. Dep't of Justice*, 49 F.3d 115, 118 (4th Cir.), *cert. denied*, 516 U.S. 843, 133 L. Ed. 2d 78, 116 S. Ct. 130 (1995). The FOIA requires an agency to respond to a proper request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(I). In this case, Plaintiff filed its most recent FOIA request to the Baltimore Office of the I.R.S. by letter dated December 18, 2001. It sought to add that request to this lawsuit in the amended complaint that it filed on January 11, 2002. There were only sixteen working days between the date Plaintiff filed its December 18, 2001 FOIA request and the date it filed its amended complaint. As such, Plaintiff failed to exhaust its administrative remedies before filing suit, and accordingly, this Court does not have jurisdiction over the December 18, 2001 FOIA request.[8]

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[8] Plaintiff argues that it asked for "expedited processing" of this request, and that because the I.R.S. did not respond within ten days, this Court has jurisdiction. Pl.'s Reply at 12-13. Section 552(a)(6)(E) directs agencies to promulgate rules for expedited processing where the requester "demonstrates compelling need." The statute defines "compelling need" as either, "failure to obtain requested records on an expedited process could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;" or "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v). In its request, Plaintiff alleged that it was the victim of ongoing criminal activity, and would be unable to vindicate its rights without the requested documents. Pl.'s Exh. 17, at 2. Plaintiff's request for expedited processing does not meet the statutory definition of "compelling need." Because Plaintiff did not exhaust its administrative remedies, this Court lacks jurisdiction to enforce the December 18, 2001 request. Because that request is properly before the court in Washington, D.C., Plaintiff will suffer no prejudice by this Court dismissing it. *See* Defs.' Mot. at 8 n.15.

III. DISCUSSION

Plaintiff first contends that the I.R.S.'s search for the requested documents failed to meet articulated standards of thoroughness and requests discovery of "the reasonableness and adequacy of Defendants' search for responsive documents." Pl.'s Reply at 20. To support its allegation, Plaintiff argues that the I.R.S. failed to produce or even reference "numerous documents known to [Plaintiff] which are without question in the possession of the I.R.S." Pl.'s Mot. at 9. Specifically, Plaintiff claims that these documents relate to Plaintiff's criminal conflict of interest complaints against Commissioner Rossotti, its written requests for meetings, and meetings Plaintiff had with the I.R.S. *Id.* Further, Plaintiff argues that the fact that the above-described documents were included in the I.R.S.'s document submission to the United States District Court for the District of Columbia in the pending I.R.S. summons enforcement action against Plaintiff is evidence of Defendants' bad faith conduct in its search for responsive documents. Pl.'s Reply at 17.

When this Court judges the adequacy of the I.R.S. search for documents, "the relevant question is not whether every single potentially responsive document has been unearthed, but whether the agency has demonstrated that it has conducted a search reasonably calculated to uncover all relevant documents." *Ethyl Corp.*, 25 F.3d at 1246 (internal quotations and citations omitted). To demonstrate the adequacy of its search, an agency must submit affidavits "that explain in reasonable detail the scope and method of the search conducted by the agency ...." *Perry v. Block*, 221 U.S. App. D.C. 347, 684 F.2d 121, 127 (D.C. Cir. 1982). A search is not unreasonable "simply because it fails to produce all

relevant material ...." *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 790 F.2d 942, 952-53 (D.C. Cir. 1986).

In this case, the Magin Declaration outlines the scope and method of the search conducted by the Baltimore Disclosure Office. When the Baltimore disclosure specialist received the first FOIA request, the only significant activity within Maryland concerning Plaintiff was the audit of its tax-exempt status.[9] Magin Decl. at P 4. To locate documents potentially responsive to the FOIA request made to Baltimore, the I.R.S. searched the files of the Tax Exempt and Government Entities (TEGE) function, the I.R.S. function responsible for conducting the audit. *Id.* With respect to the second and third FOIA requests, the disclosure specialist requested the Baltimore office of TEGE to search for responsive records, and the search focused on the audit being conducted out of that office. *Id.* at PP 5, 6. When the disclosure specialist received Plaintiff's fourth FOIA request, she again checked to see what activity concerning Plaintiff existed in Maryland. The only open activity concerning Plaintiff was the pending audit in the TEGE function. Because that was the only activity, that function was the only one searched for responsive documents. *Id.* at P 8.

The Court concludes that the I.R.S. has met its burden of showing that it conducted an adequate search. As the Baltimore office received Plaintiff's FOIA requests, it determined what was the significant activity within Maryland concerning Plaintiff and tailored its search according to that

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[9] Because this Court has decided to limit its review to Plaintiff's FOIA requests directed to the I.R.S. office in Maryland, it will judge only the searches conducted in Maryland.

activity. The Court is satisfied that the I.R.S. searched the locations within Maryland where it might reasonably expect to find documents which Plaintiff was seeking in its FOIA requests.

Plaintiff next argues that Defendants "have failed to produce a *Vaughn* index or otherwise establish their alleged entitlement to the various exemptions to production they assert as required by law." Pl.'s Reply at 3. A *Vaughn* index "is a surrogate for the production of documents for in camera review, designed to enable the district court to rule on a privilege without having to review the document itself." *Ethyl Corp.*, 25 F.3d at 1249. The court in *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974), directed that the government provide "a detailed justification for its exemption and index the documents against the justification, fragmenting the documents into segregable parts." *Ethyl Corp.*, 25 F.3d at 1250. The Ninth Circuit has observed:

> The form of disclosure is not critical. What matters is the substantive adequacy of the disclosures, in whatever form, to enable the requester to be able to make an intelligent judgment whether to contest claims of nondiscoverability and the court to decide them. Any form – letter, *Vaughn* index, affidavit, copy of redacted document – may be adequate or inadequate depending on the circumstances.

Fiduccia v. Dep't of Justice, 185 F.3d 1035, 1044 (9th Cir. 1999).

In this case, the I.R.S. provides the declarations of Sarah Tate, an attorney in the office of the I.R.S. Assistance Chief Counsel, Disclosure and Privacy Law and Michael Frosch, a Branch Chief in the office of the I.R.S. Assistance Chief Counsel, Disclosure and Privacy Law. Tate's declaration divides the withheld or redacted pages by way of claimed FOIA exemption. *See* Tate Decl. at PP 8-12. Tate provides the number of pages falling under each exemption, describes the type of page (*e.g.*, memorandum, correspondence, *etc.*), and explains how the page corresponds to the exemption. *Id.* Although not labeled as a *Vaughn* index, this Court concludes that Tate's declaration performs the same function. The declaration describes the withheld material in sufficient detail to enable the Court to determine whether the pages fall within the claimed exemption.

The I.R.S. has redacted "return information" of taxpayers other than Plaintiff from twenty-two pages and withheld five pages of that information in full, in reliance upon 5 U.S.C. § 552(b)(3) and 26 U.S.C. § 6103(a). Tate Decl. at P 8. The FOIA exemption 3 provides that an agency is not required to produce documents,

> ... that are specifically exempted from disclosure by statute ..., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Under this exemption, if the Court determines that a relevant statute exists, and that any of the withheld information falls within coverage of the exempting statute, the material must be

withheld. *Fund for Constitutional Gov't v. Nat'l Archives and Records Serv.*, 211 U.S. App. D.C. 267, 656 F.2d 856, 868 n.29 (D.C. Cir. 1981).

Section 6103 of the Internal Revenue Code has been held to be an exempting statute under exemption 3 of the FOIA. *Church of Scientology of California v. I.R.S.*, 484 U.S. 9, 15, 98 L. Ed. 2d 228, 108 S. Ct. 271 (1987). Section 6103 provides that "returns and return information shall be confidential" and prohibits any United States officer or employee from disclosing any such information. 26 U.S.C. § 6103(a). Return information is defined as:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, or is being examined, or subject to other investigations or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence of liability (or amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense ...."

26 U.S.C. § 6103(b)(2)(A).

Clearly, section 6103 prohibits the release of records containing tax return information of third parties. *Kim*, 1999 U.S. Dist. LEXIS 20612, 1999 WL 1424998, at *3. The Court agrees with the I.R.S. that return information of

taxpayers other than Plaintiff cannot be released to Plaintiff absent some exception to the general rule.

The I.R.S., relying upon 5 U.S.C. § 552(b)(6), has redacted from five pages the names of lower-level clerical employees contained in correspondence or a correspondence log, and the home telephone number of an I.R.S. employee. Tate Decl. at P 9. The FOIA exemption 6 protects information contained in an agency's "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court has broadly interpreted the types of files to which this exemption applies, holding that the protection of the personal privacy interests does not turn on the label of the file which contains the information, but instead, the exemption is intended to cover detailed Government records on an individual which can be identified as applying to that individual. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602, 72 L. Ed. 2d 358, 102 S. Ct. 1957 (1982). The I.R.S. argues that the public interest in this type of information extends only to matters that go to the "core purpose" of the FOIA "to shed light on the agency's performance of its duties," *Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989), and that no public interest exists in disclosing the names of the lower-level employees who were tasked with ministerial duties. Defs.' Mot. at 21.

Plaintiff does not object to the redaction of the home telephone number but does object to the redaction of the employees' names. Pl.'s Reply at 9. Plaintiff argues that no personal privacy issues exist to serve as the basis for the redaction of the names and that the disclosure of the entire

responsive document is necessary to "fully and fairly vindicate its constitutional rights." *Id.* at 9-10. The Court concludes that federal employees do have a privacy interest in the non-disclosure of their names and that Plaintiff suffers no prejudice by the redaction of these names. *See U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 975 F.2d 348, 353 (7th Cir. 1992). The I.R.S. has disclosed the entire document to Plaintiff except for the names of the employees. Plaintiff argues that disclosure of the employees' names is necessary to vindicate its rights. but does not explain how knowledge of the names will help in that vindication. Additionally, the Court does not understand how disclosure of the employees' names will provide Plaintiff with information about the government's operations. *See id.* at 354 ("If a FOIA disclosure request would not reveal information about the government's operations, then it is not in the public interest."). As such, the Court concludes that the I.R.S. properly redacted the employees' names and a home telephone number from five pages of responsive documents.

The I.R.S. has redacted information (names, addresses, and postal bar codes) from eighty-eight pages that would identify people who wrote to the I.R.S., either directly or through their elected representatives, expressing concerns about whether Plaintiff was complying with the laws that govern its tax-exempt status. Tate Decl. at P 10. Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), exempts from disclosure "records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The Court must first determine that the information the I.R.S. seeks to withhold under Exemption 7(C) was "compiled for law enforcement purposes." Courts have held that this exemption covers not only records of criminal investigations, but also records relating to civil enforcement matters and matters involving administrative regulatory enforcement. *See, e.g., Baltimore Sun v. U.S. Marshals Service*, 131 F. Supp.2d 725, 728 n.2 (D. Md. 2001). Additionally, courts have found that this exemption covers the I.R.S.'s files of civil income tax audits and civil tax collection cases. *Williams v. I.R.S.*, 479 F.2d 317, 318 (3rd Cir. 1973). In this case, the I.R.S. retrieved these responsive documents from the files concerning its audit of Plaintiff's tax-exempt status. Tate Decl. at PP 4,8. These are investigatory files compiled for civil law enforcement purposes. As such, the Court must next determine whether production of this information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The I.R.S. argues that the private individuals who submitted their concerns about Plaintiff have an interest in maintaining their personal privacy. Defs.' Mot. at 24. Name and address lists implicate significant privacy interests under FOIA. *Becker v. I.R.S.*, 1992 U.S. Dist. LEXIS 5081, 1992 WL 67849, at *5 (N.D. Ill. 1992); *rev'd on other grounds*, 34 F.3d 398 (7th Cir. 1994). The Court must then balance the privacy interests of these individuals against the public interest in disclosure. *Id.* Plaintiff argues that the names and addresses should be disclosed so that Plaintiff may investigate the "connection between the volunteer tipsters and the retaliatory, political motivation for the unconstitutional audit and investigation." Pl.'s Mot. at 12. The Court does not find this reason to be of genuine public interest. The Court does

not agree that disclosure of the identifying information of these private individuals would contribute anything to the public understanding of the operations or activities of the I.R.S. *See Becker*, 1992 U.S. Dist. LEXIS 508, 1992 WL 67849, at *6. The Court holds that the names and other identifying information sought were properly redacted and withheld under exemption 7(C).

Finally, the I.R.S. withheld two draft legal opinions (totaling seventeen pages) and redacted information from another fifteen pages. Tate Decl. at PP 11, 12. The matters withheld include information provided to I.R.S. attorneys regarding the audit of Plaintiff, the opinions of those I.R.S. attorneys, and drafts of those attorneys' advice. *Id.* The I.R.S. asserts that it has properly withheld that information under the FOIA exemptions 3, 7(A), and 5. Defs.'s Mot. at 27-29. Because this Court concludes that exemption 5 covers all of the documents, it will not discuss the applicability of exemptions 3 and 7(A).

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." A document must satisfy two conditions in order to fall under exemption 5; "its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 8, 149 L. Ed. 2d 87, 121 S. Ct. 1060 (2001). The privileges against discovery include the attorney work-product privilege and the "deliberative process" privilege. *Id.* "Work product protects the mental processes

of the attorney, while deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* (internal quotations and citations omitted).

In this case, the I.R.S. has withheld a list of recommended issues to be pursued in the audit of Plaintiff and a discussion of the I.R.S.'s ability to support its position on those issues; internal e-mails about the audit circulated among attorneys in the I.R.S. Office of Chief Counsel; and two draft memoranda from the Assistant District Counsel for the Delaware-Maryland District to the Delaware-Maryland District Director of the I.R.S. Tate Decl. at PP 11, 12. These types of documents are the type traditionally protected by the government deliberative process privilege. *See City of Virginia Beach v. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) ("Thus, the deliberative process exemption protects recommendations, draft documents, proposals, suggestions, and other objective documents which reflect personal opinions of the writer rather than policy of the agency." (internal quotations omitted)). Because the Court concludes that these documents are protected by the privileges codified in FOIA exemption 5, the I.R.S. acted properly in redacting and withholding these pages.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendant's Motion to for Summary Judgment and deny Plaintiff's Motion for Summary Judgment. A separate order consistent with this memorandum will issue.

William M. Nickerson

Senior United States District Judge

Dated: December 16, 2002

ORDER

Pursuant to the foregoing Memorandum, and for the reasons stated therein, IT IS this 16th day of December, 2002, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff's Motion for Summary Judgment (Paper No. 44) is hereby DENIED;

2. That Defendant's Motion for Summary Judgment (Paper No. 56) is hereby GRANTED;

3. That this case is hereby CLOSED;

4. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

5. That the Clerk of the Court shall mail or transmit copies of this Memorandum and Order to all counsel of record.

William M. Nickerson

Senior United States District Judge

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No. 03-1389

In the Supreme Court of the United States

JUDICIAL WATCH, INC., PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Freedom of Information Act allows the government to withhold from disclosure information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). The question presented is:

Whether Exemption 6 of the Freedom of Information Act allows the government to withhold the names of lower-level clerical employees of the government identified in Internal Revenue Service correspondence or a correspondence control log.

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In the Supreme Court of the United States

No. 03-1389

JUDICIAL WATCH, INC., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the *Federal Reporter*, but is *reprinted in* 84 Fed. Appx. 335. The opinion and order of the district court (Pet. App. 15-33) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 6, 2004. The petition for a writ of certiorari was filed on April 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended by the Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No.

107-306, § 312, 116 Stat. 2390-2391, Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (internal quotation marks and citations omitted). In particular, "[a]t the same time that a broad philosophy of 'freedom of information'" was enacted into law, Congress sought to "protect certain equally important rights of privacy with respect to certain information in Government files." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (quoted in *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372-373 n.9 (1976)); see also S. Rep. No. 221, 98th Cong., 1st Sess. 21 (1983) ("Since passage of the FOIA in 1966, Congress has recognized the need to balance an open government philosophy against legitimate concerns for the privacy of individuals.").

Accordingly, because "public disclosure is not always in the public interest," Congress provided in FOIA Exemption 6 that information contained in "personnel and medical files and similar files" may be withheld if the disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). To determine whether disclosure would result in a clearly unwarranted invasion of privacy, courts must balance the public interest in disclosure against the intrusion on privacy that would result. See, *e.g.*, *Department of State* v. *Ray*, 502 U.S. 164, 175 (1991); *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 602-603 (1982).

2. Petitioner submitted four FOIA requests to eleven offices of the Internal Revenue Service (IRS) seeking copies of all records pertaining to petitioner or its founder, Larry Klayman. Pet. App. 3. The IRS provided 785 pages in full and 125 redacted pages in response to those requests. *Id.* at 2-3. As relevant here, the IRS redacted, pursuant to Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), the names of lower-level clerical employees that were contained in correspondence or a correspondence control log. Pet. App. 7, 27.

Petitioner filed suit under FOIA seeking, *inter alia*, an order requiring release of the redacted names of IRS employees. Pet. App. 4, 18. The district court granted the IRS's motion for summary judgment and denied petitioner's cross-motion. *Id.* at 15-33. With respect to the IRS's redaction of employees' names, the district court held that Exemption 6 applies to a broad variety of files containing information that can be identified as applying to an individual. *Id.* at 27. Noting that petitioner did not contest the IRS's redaction, pursuant to Exemption 6, of an employee's telephone number from the requested records, the district court concluded that lower-level employees possessed a similar privacy interest in non-disclosure of their names. *Id.* at 27-28. The court further concluded that petitioner made no showing that "disclosure of the employees' names will provide [it] with information about the government's operations." *Id.* at 28.

3. The court of appeals affirmed. Pet. App. 1-14. The court noted, as an initial matter, that the phrase "similar files," as used in Exemption 6, has been given a broad meaning, consistent with congressional purpose to protect against disclosure of the vast array of personal information that is stored in governmental records. *Id.* at 8 (citing *Washington Post Co.*, 456 U.S.

at 598). Following this Court's decision in *Department of Defense* v. *FLRA*, 510 U.S. 487 (1994), which had held that the addresses of government employees could be withheld under Exemption 6, the court reasoned that the names of lower-level government employees could be protected because disclosure implicated the same privacy interest in not being "disturbed at home by work-related matters" and "control[ing] * * * information concerning his or her person." Pet. App. 9 (quoting *Department of Def.* v. *FLRA*, 510 U.S. at 500-501). The court concluded that the employees' privacy interests were not outweighed by any countervailing public interest in disclosure because petitioner "has offered no explanation as to how the names of lower-level I.R.S. employees would reveal information about the government's operations." *Id.* at 10.

Judge Luttig dissented. Pet. App. 11-14. He would have held that the employees' names did not constitute "personnel[,] medical . . . [or] similar file[s]" within the meaning of Exemption 6. *Ibid.*

ARGUMENT

Petitioner argues (Pet. 8) that this Court should grant review of the court of appeals' "implicit" holding that lower-level employees' names constitute the type of files protected against disclosure by FOIA Exemption 6. That claim does not merit this Court's review for three reasons.

First, petitioner identifies no conflict in the circuits on the question whether Exemption 6 protects against disclosure of the names of lower-level federal employees. In fact, the court of appeals' holding that Exemption 6 is applicable to the employees' names is consistent with the rulings of other circuits. See, *e.g.*, *Lakin Law Firm, P.C.* v. *FTC*, 352 F.3d 1122, 1123-1124

(7th Cir. 2003) (Exemption 6 applies to the identities of consumers who made complaints to the Commission), cert. denied, No. 03-1468, 2004 WL 906614 (June 14, 2004); *Sheet Metal Workers Int'l Ass'n* v. *Air Force*, 63 F.3d 994, 997-998 (10th Cir. 1995) (Exemption 6 protects against disclosure of the names of employees of private contractors performing federal construction projects); *Strout* v. *United States Parole Comm'n*, 40 F.3d 136, 139 (6th Cir. 1994) (Exemption 6 supports redaction of the names of persons who had written to the Parole Commission); *Department of Navy* v. *FLRA*, 975 F.2d 348, 352-353 (7th Cir. 1992) (federal employees' names protected); *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 516 (2d Cir. 1992) (same); cf. *Becker* v. *IRS*, 34 F.3d 398, 404-405 (7th Cir. 1994) (names of IRS employees properly redacted from files relating to taxpayer under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C)); *FLRA* v. *Department of Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1456 (D.C. Cir. 1989) (release of federal employees' names would violate the Privacy Act of 1974, 5 U.S.C. 552a), cert. denied, 493 U.S. 1055 (1990); *Stone* v. *FBI*, 727 F. Supp. 662, 664-665 (D.D.C.) (sustaining the withholding of names of federal agents who investigated the assassination of Robert F. Kennedy), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990).

The courts of appeals have found that the withholding of employee names and similar identifying information is particularly appropriate when, as here, the individuals are lower-level employees. See *Perlman* v. *Department of Justice*, 312 F.3d 100, 107 (2d Cir. 2002) (the rank of a federal employee is one factor to be weighed in assessing the degree of the privacy interest), cert. granted and judgment vacated, 124 S. Ct. 1874 (2004) (directing reconsideration in light of

National Archives & Records Admin. v. *Favish*, 124 S. Ct. 1570 (2004)); *Stern* v. *FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (applying the same analysis as *Perlman*).

Second, contrary to petitioner's argument (Pet. 10-14), the court of appeals' ruling protecting names in correspondence and a correspondence log accords with decisions of this Court. See *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam) (Exemption 6 protects against the disclosure of names and addresses in an agency mailing list); *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) (Exemption 6 protects names and addresses of federal employees); *Department of State* v. *Ray*, 502 U.S. 164, 175-179 (1991) (names of Haitian refugees protected under Exemption 6); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376-377, 381 (1976) (Exemption 6 protects the names and other identifying information of Air Force Academy cadets, including those who continue to serve as federal employees); see generally *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600, 601 (1982) (Exemption 6 protects even information that is "not intimate," if the disclosure "might harm the individual") (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)).

Third, the court of appeals' holding is correct. Petitioner devotes substantial effort to challenging what it characterizes as the court's "implicit" holding (Pet. 8) that the names themselves constitute "similar files" under Exemption 6 (Pet. 10-11). The court of appeals had no need to make such a holding, explicitly or implicitly. This Court made clear in *Washington Post*, *supra*, that Exemption 6's protections are triggered by the potential for disclosure of "information which applies to a particular individual," not by "the label of the

file which contains the damaging information." 456 U.S. at 601, 602.

In any event, the names at issue here were contained in correspondence and correspondence logs relevant to the audit records of petitioner, Pet. App. 7-8, and petitioner has not disputed that those audit and related correspondence records constitute "similar files" within the meaning of Exemption 6, see Pet. 7 (asserting that petitioner itself has a privacy interest in the audit records that is protected by Exemption 6). Indeed, petitioner *conceded* that an IRS employee's telephone number was properly withheld under Exemption 6 from the same records at issue here. Pet. App. 27. If, in petitioner's view, the correspondence records constitute "similar files" for purposes of redacting a federal employee's telephone number, they retain that status for purposes of redacting employees' names.

Petitioner also contends (Pet. 13-15) that FOIA's protection of "personal privacy" extends only to the subject of the file. This Court unanimously held exactly the opposite three months ago. *Favish*, 124 S. Ct. at 1576-1578 (FOIA's protection of "personal privacy" includes the interests of family members in controlling death-scene records of their close relatives). That case concerned FOIA's protection of personal privacy in the context of law-enforcement records, 5 U.S.C. 552(b)(7)(C), rather than Exemption 6.* But, while the two exemptions "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions,"

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* Section 552(b)(7)(C) of Title 5 exempts from the government's general duty of disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Department of Defense v. *FLRA*, 510 U.S. at 497 n.6, the types of "personal privacy" interests protected by both exemptions are the same. See *Favish*, 124 S. Ct. at 1579-1580 (explaining that the Court's decision about the scope of Exemption 7's protection of "personal privacy" "is consistent with" court of appeals' holdings providing similar protection for decedents' families under Exemption 6, and citing cases). Indeed, if Congress wanted to limit Exemption 6's protection of privacy to the subject of the records, it likely would have employed the same type of limiting language that appears in the Privacy Act. See 5 U.S.C. 552a(a)(4) (protecting records that are "about an individual"), 552a(b) (prohibiting the disclosure of qualifying records absent the consent of "the individual to whom the record pertains").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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INTERNAL REVENUE SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition ("Opp.") underscores the need for the Court to issue a writ of certiorari to review the appellate court's decision in this case. Absent from Respondent's brief is any serious attempt to explain how the appellate court's decision can be reconciled with the plain language of the Freedom of Information Act ("FOIA") or this Court's precedent. Left unanswered is how a government employee's name, appearing in an audit file on Petitioner at

the Internal Revenue Service ("IRS"), constitutes a personnel or medical or similar file, much less a "detailed Government record[] on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Washington Post*, 456 U.S. 595, 602 (1982). The only answer is through a wholly improper judicial expansion of FOIA's Exemption 6. Because of the broad and long-term ramifications of the appellate court's ruling, the petition should be granted.

Those ramifications extend far beyond this case. Petitioner, as a frequent user of FOIA, increasingly finds itself blocked by the improper application of Exemption 6 in its efforts to investigate "what the government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). For example, in response to a recent FOIA request relating to government contracts awarded to a subsidiary of Halliburton Co. for work in Iraq, the Department of the Army redacted the names of government employees involved in the awards allegedly pursuant to Exemption 6. *See* Exhibits 1-3 attached hereto (*Judicial Watch, Inc. v. Department of the Army*, Case No. 04-0301 (D.D.C.)). These documents did not come from personnel, medical, or any type of remotely similar file. No readily identifiable privacy interests on the part of the employees were at stake. Nevertheless, Exemption 6 was invoked simply because government employees' names appeared in the documents. This on-going, improper application of Exemption 6 is exactly what is at issue in this case and is typical of Petitioner's recent experience in attempting to obtain information from the government through FOIA. It also is why review by this Court is necessary.

Respondent offers two basic arguments for why review of the appellate court's decision is allegedly not appropriate: (1) the appellate court's decision is purportedly consistent with decisions of other circuit courts; and (2) the appellate court's decision is allegedly consistent with past rulings of this Court. Opp. at 4-8.

Even though Petitioner did not assert the existence of a conflict among the circuit courts of appeal, Respondent cites a string of FOIA cases from other circuits ostensibly demonstrating that the appellate court's ruling is consistent with the rulings of other circuit courts and further demonstrating, allegedly, that the names of government employees are redacted routinely from government records. Opp. at 5-6. However, none of these cases addresses the issue of what constitutes a personnel, medical or similar file under FOIA's Exemption 6 or this Court's precedent. For example, in *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122 (7th Cir. 2003), a FOIA requester sought the release of names of persons who had filed complaints with the Federal Trade Commission. The court applied a balancing test to determine whether the public interest in disclosure outweighed the privacy interest of the persons who had filed the complaints. However, in performing this balancing test the court failed to determine, as an initial matter, whether these names appeared in personnel, medical, or similar files about the persons making the complaints. The Seventh Circuit in *Lakin* thus made the very same error the appellate court made in this case: it ignored the entire first half of a proper Exemption 6 analysis. In doing so, both courts not only ignored this Court's precedent, but they also effectively re-wrote Exemption 6. *Lakin* thus *helps* to demonstrate why review by this Court is necessary. *See also Strout v. U.S. Parole*

Comm'n, 40 F.3d 136 (6th Cir. 1994) (applying balancing test to names of people who wrote to Parole Commission opposing granting parole to FOIA requestor/inmate.)

Respondent also cites *Sheet Metal Workers Int'l Ass'n v. Air Force*, 63 F.3d 994 (10th Cir. 1995) in support of its argument. At issue in that case was the release of the names and addresses of government employees contained in payroll records. However, the payroll records at issue in *Sheet Metal Workers* clearly constituted "personnel" files, and, thus, the court had no need to undertake a lengthy analysis of whether the files at issue were the types of files protected by Exemption 6. Respondent cites no fewer than four similar cases involving the release of names of government employees from personnel files. *Department of Defense v. FLRA*, 510 U.S. 487 (1994); *Department of Navy v. FLRA*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503 (2nd Cir. 1992); *FLRA v. Department of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989). Unlike this case, none of these cases involved a clear challenge to whether the "personnel and medical and similar files" provision of Exemption 6 even applied. As a result, they are unavailing to Respondent.

Respondent discusses only briefly whether the appellate court's decision is consistent with this Court's precedent. Respondent tries to reconcile the appellate court's decision with *Washington Post*, but only does so by quoting the case out of context. Respondent relies on the Court's statement in *Washington Post* that disclosure is not determined by the "label of the file which contains the damaging information." Opp. at 6-7. In *Washington Post*, however, the Court plainly recognized that antecedent to any

balancing of an individual's interest in keeping certain types of information private and the public interest in having that same information disclosed is a "threshold test" inquiring into whether the information at issue is contained in a personnel, medical or similar file. *Washington Post*, 456 U.S. at 602 n.4. The Court's admonition about the label on the file in which the information is contained should not be taken as justification for applying Exemption 6's balancing test to *any* type of information *regardless* of the type of file in which it is contained. The Court in *Washington Post* did not give a green light to agencies to disregard the plain language of Exemption 6.[1]

Respondent's unrestrained view of the scope of Exemption 6 is well illustrated by its reliance on the Court's recent ruling in *National Archives & Records Admin. v. Favish*, 124 S. Ct. 1579 (2004). In *Favish*, the Court recognized that, in certain circumstances, the privacy interests protected by FOIA Exemption 7(C) extend to the family members of deceased persons. *Id.* at 1578. *Favish* says nothing about any conceivable privacy interest that government employees may possess when their names appear

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[1] Respondent also argues that application of Exemption 6 is particularly appropriate where the information at issue concerns "lower-level employees." Opp. at 5 (citing *Perlman v. Department of Justice*, 312 F.3d 100 (2d Cir. 2002). However, the court in *Perlman* only looked at the employee's status as one factor to consider in balancing the privacy interests at stake against the public interest in disclosure, not in addressing the threshold question of whether the record in question constituted a "similar" file.

in government files about third parties. It certainly does not shed any light on what constitutes a "similar file" under Exemption 6.

Respondent's reliance on *Favish* does reveal, however, the government's apparent inability to resist exploiting FOIA's privacy exemptions to withhold information from public scrutiny. As demonstrated in the Petition, the use of Exemption 6 has increased dramatically in recent years. Despite the plain language of the statute and this Court's past rulings, agencies are now using Exemption 6 to routinely withhold the names of government employees, regardless of the subject matter or type of file in which the names are found. Clearly, it is difficult, if not impossible, for the public to investigate and understand "what the government is up to" if the names of government employees are so easily exempt from disclosure. *Favish* does not justify or excuse such an expansive reading of Exemption 6.

Finally, Respondent makes the curious assertion that Petitioner "has not disputed" that the audit and related records at issue constitute "similar files" within the meaning of Exemption 6 and claims that Petitioner previously "conceded" that an IRS employee's telephone number was withheld properly. Opp. at 7. Of course, Petitioner has always maintained that the records at issue were detailed government records about Petitioner and can be identified as applying to Petitioner. *Washington Post*, 456 U.S. at 602. That does not mean, however, that those same records also constitute detailed government records on a government employee and can be identified as applying to that employee. *Id.* An IRS employee's name in Petitioner's audit file does not transform the audit file into a personnel, medical or similar file on *that*

employee. Moreover, the fact that Petitioner elected not to challenge the withholding of a telephone number of an government employee in no way constitutes the "concession" Respondent claims it to be, nor does it alter Petitioner's entitlement to the names of government employees that appear in Petitioner's own audit file.

In short, the issue raised in the Petition has broad significance well beyond this case, justifying review by this Court. The appellate court's decision assumes that the mere name of a government employee in a file about a third party transforms that file into a "medical, personnel or similar files" about that employee. It also effectively removes from FOIA the entire first part of the two-part test set forth in Exemption 6 and ignores the admonition of this Court to interpret the disclosure provisions of FOIA broadly and to interpret its exemption provisions narrowly. More importantly, if the appellate court's decision is allowed to stand, it will significantly narrow the view through an essential window on government activity that is vital to an open society.

Respectfully submitted,

Paul J. Orfanedes*
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

September 2004

Counsel for Petitioner

*Denotes Counsel of Record

[redacted] HQ02

n: [redacted] HQ02
Sent: Monday, February 24, 2003 1:21 PM
To: [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] A HQ02; [redacted] SWD; [redacted] COL HQ02; [redacted] SWT
Cc: [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02
Subject: RE: oil

A-1

[redacted]

I'm attaching to this notes that I sent out to everyone on Friday evening so all addressed here w information that I provided in most comprehensive form. I am going to include LTG Flowers bec on the Friday evening notes. I believe all should clearly understand the challenges from the OS information does not get filtered through so many where we sometimes lose accuracy.

A-1

[redacted]

-----Original Message-----
From: [redacted] HQ02
Sent: Friday, February 21, 2003 6:13 PM
To: [redacted] SWD
Cc: [redacted] MG HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] L HQ02; [redacted] HQ02; [redacted] L HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] HQ02; [redacted] SWD; [redacted] VT; [redacted] HQ02
Subject: Update

[redacted]

I bring the following to your attention for information and action of your staff:

a. **Acquisition Plan** --PARC approved with contingencies the Acquisition Plan, 20 February 2003. A copy of the Plan is being sent to HQDA for their information and for the information of OSD. UOC should also send the plan back to SWD for your folks to review and work the contingencies. Working out the contingencies, making the corrections and clarifications do not have to return to the PARC for any additional review.

b. **J&As** -- The J&As at HQDA have not been approved yet. I spoke with [redacted] (OSD) and she stated that the earliest that she can provide her input regarding the sole source J&A to HQDA would be Tuesday, 25 February 2003. [redacted] also stated that her priorities for approval will be Sole source J&A and later Limited Competition J&A -- the J&As will not be considered for approval concurrently. According to [redacted], because of other pressing issues regarding the overarching Campaign, there is no way to accelerate earlier than Tuesday, 25 February 2003. However, see below an additional OSD requirement that must be provided by SWD and I would say at this time, no later than Monday, 24 February 2003, that conditions that approval of the J&A. [redacted] will be able to provide on Monday, 24 February 2003. after checking with the HQDA reviewers of the J&A, the Army target date for the approval.

c. **Acquisition Strategy Requirement** -- OSD sent a letter to HQDA on 07 February 2003, Subject: Management and Oversight of Acquisition of Services Process, where Under Secretary Aldridge has directed that the Army Acquisition Executive notify him before approving the acquisition strategy for any acquisition services with a total planned dollar value equal to or greater that $2 billion, so that Secretary Aldridge may make a determination as to any OSD special inerest and he AAE must keep Secretary Aldridge apprised of actions to address significant cost, schedule, or performance problems n any acquisition of services that exceeds the @ billion threshold. **The Acquisition Strategy must be submitted to OSD in the format of Attachment A to the letter not later than Monday, 24 February 2003 for [redacted] to get it approved. She will not provide input on the J&A until the Acquisition Strategy is approved. I faxed the package to support revision of the Acquisition Strategy to [redacted] and [redacted] to coordinate completion of that**

EXHIBIT 1

BEST AVAILABLE COPY

A-2

[redacted] HQ02

From: [redacted] SWT
Sent: Thursday, February 27, 2003 5:43 PM
To: [redacted] SWD; [redacted] HQ02; [redacted] SPD
Cc: [redacted] SWD; [redacted] SWD; [redacted] SWD; [redacted] SWT; [redacted] AKO; [redacted] SWD; [redacted] SWD; [redacted] SWD
Subject: RE: Update from [redacted]

A-2

Sir,

I understand that the exec summary that we sent to [redacted] has not been forwarded to y SIPR mail is snail mail. We must get better at this. [redacted] is contacting [redacted] Sorry about the delay. Al and I finished the more detailed version of the meeting minutes tc distributing it.

[redacted]

-----Original Message-----
From: [redacted] SWD
Sent: Thursday, February 27, 2003 3:27 PM
To: [redacted] HQ02; [redacted] SWT
Cc: [redacted] SWD; [redacted] SWD; [redacted] SWD; [redacted] SWT; [redacted] AKO; [redacted] SWD; [redacted] SWD; [redacted] SWD
Subject: RE: Update from [redacted]

[redacted]

Thanks. Will view the classified version this evening.

[redacted]

-----Original Message-----
From: [redacted] HQ02
Sent: Thursday, February 27, 2003 2:17 PM
To: [redacted] SWD
Cc: [redacted] SWD; [redacted] SWD; [redacted] SWD; [redacted] SWT; [redacted] AKO; [redacted] SWD; [redacted] SWD; [redacted] SWD
Subject: Update from [redacted]

Sir,

Figured that I better check in and report progress. [redacted] called me at 0930 today at the HQ building where I'm working today and said that the Exec Summary for [redacted] which was due at 0800 tomorrow was needed at 1030 this morning. I got it to [redacted] in time, but did not get a chance to send it to you for your review due to the short notice. Some edits were made by [redacted] and [redacted] and I'll SIPR it to you just as soon as I get a final copy back.

I also have more detailed meeting minutes which I'll be sending out this PM or early in the morning.

[redacted] and [redacted] have been working issues feverishly. The meeting was effective in generating a sense of urgency. The J&A for the sole source has been revised and staffed, is sitting on the desk of the ASA(ALT) awaiting signature in the morning (28 Feb). We still need indemnification.

EX. 6

[redacted]HQ02

From: [redacted], OSD-ATL [redacted]@osd.mil]
Sent: Sunday, March 02, 2003 1:22 PM
To: [redacted]@HQ02.USACE.ARMY.MIL'; Fr[redacted]; [redacted]@us.army.mil; [redacted]; A[redacted]; OSD-ATL; [redacted]@us.army.mil; [redacted]@us.army.mil; [redacted]@us.army.mil
Cc: [redacted]
Subject: RE: J&A Preparation

A-3

Correction for unclas emails intended to reach [redacted].

A-3

[redacted]@osd.mil <mailto:[redacted]@osd.mil>
(Leave out the second "t" in the last name - otherwise the message will go to a desk I'm not a

-----Original Message-----
From: [redacted]@HQ02.USACE.ARMY.MIL [redacted]@HQ02.USAC
Sent: Monday, February 10, 2003 6:56 PM
To: [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@us.army.mil; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@osd.mil; [redacted]@us.army.mil; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@HQ02.USACE.ARMY.MIL; [redacted]@us.army.mil; [redacted]@us.army.mil
Cc: [redacted]@swd02.usace.army.mil; [redacted]@swd02.usace.army.mil; [redacted]@HQ02.USACE.ARMY.MIL
Subject: RE: J&A Preparation

Just a correction for me: [redacted]@hq02.usace.army.mil [redacted]a@hq02.usace.army.mil>
[redacted]

-----Original Message-----
From: [redacted]HQ02
Sent: Monday, February 10, 2003 6:40 PM
To: [redacted]SAALT'; [redacted]HQ02; [redacted]HQ02; [redacted]H HQ02; [redacted]HQ02; [redacted]HQ02; [redacted]HQ02; [redacted]HQ02; [redacted]HQ02;
Cc: [redacted]SWD; [redacted]SWD; [redacted]HQ02
Subject: FW: J&A Preparation

All,

I'll add to the list of contacts present at HQUSACE at today's VTC.

[redacted], ASA(ALT), SAAL-ZP, 703-604-7006, [redacted]@saalt.army.mil <mailto:[redacted]@saalt.army.mil>

[redacted], OSD, 703-692-6696, [redacted]@osd.mil <mailto:[redacted]@osd.mil>

[redacted], USAMC, Judge Advocate, 703-617-2556, [redacted]@us.army.mil <mailto:[redacted]@us.army.mil>

SIPR: [redacted]

[redacted], HQUSACE, Office of Chief Counsel, 202-761-8524, [redacted]@hq02.usace.army.mil <mailto:[redacted]@hq02.usace.army.mil>

EXHIBIT 3